

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON**

Case No. CV-13-304-JPH

CHARLES E. PHILLIPS, JR.,

Plaintiff,

vs.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,

Defendant.

**ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT**

**BEFORE THE COURT** are cross-motions for summary judgment. ECF No. 16, 18. Attorney Dana C. Madsen represents plaintiff (Phillips). Special Assistant United States Attorney Diana Andsager represents defendant (Commissioner). The parties consented to proceed before a magistrate judge. ECF No. 8. After reviewing the administrative record and the briefs filed by the parties, the court **grants** defendant's motion for summary judgment, ECF No. 18.

**JURISDICTION**

Phillips applied for disability income benefits (DIB) and supplemental security income (SSI) benefits June 10, 2010 alleging disability beginning July 1, 1988, amended to June 27, 2007 (Tr. 21, 88-89, 231-37, 238-41). His claims were denied initially and on reconsideration (Tr. 163-66, 167-69, 170-73, 174-76, 179-

**ORDER GRANTING DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT ~ 1**

82). Administrative Law Judge (ALJ) James W. Sherry held a hearing January 25, 2012 (Tr. 86-121)[A prior hearing was held June 11, 2007 before ALJ G. Alejandro Martinez. Tr. 48-83).] At the 2012 hearing, Phillips and a vocational expert testified. On February 14, 2012, the ALJ issued an unfavorable decision (Tr. 21-33). The Appeals Council denied review (Tr. 1-5). August 15, 2013 Phillips appealed pursuant to 42 U.S.C. §§ 405(g). ECF No. 1, 5.

### STATEMENT OF FACTS

The facts have been presented in the administrative hearing transcript, the decision below and the parties' briefs. They are only briefly summarized here and throughout this order as necessary to explain the Court's decision.

Phillips was 41 years old at onset and 46 at the 2012 hearing. He graduated from high school, served in the military for six months and has worked as an stocker. He last worked in 2001. Phillips suffers advanced glaucoma, status post surgical repair; chronic right shoulder subluxation/dislocation; advanced degenerative joint disease (DJD) of the right shoulder, status two post surgical repairs; left knee degeneration; lower left leg deep venous thrombosis; recurrent seizure disorder/epilepsy, unspecified; migraine headaches; an L1-2 compression fracture; alcohol dependence; dysthymia; adjustment disorder with depressed mood and personality disorder.

He reads with magnifying glasses and uses eye drops daily for glaucoma.

1 Medications do not prevent seizures. He can stand ten to fifteen minutes and sit from  
2 30 minutes to an hour. Reaching up with the right arm is a problem so he uses his  
3 left arm. He is able to lift ten pounds, cooks easy meals and do laundry, but, he  
4 testified, he cannot drive or shop. He began getting migraine headaches in 2010 or  
5 2011. They are severe and occur two to three times a week; a prescribed medication  
6 helps. He suffers tremors due to “nervousness or anxiety or whatever.” Phillips rolls  
7 his own cigarettes, watches television and plays video games. He visits friends three  
8 to five times a week. He is compliant now with taking prescribed medication, but  
9 admits he was not in the past (Tr. 71-74, 79, 91-93, 96-102, 104-110, 112-13, 115,  
10 260, 263, 265).

### 11 **SEQUENTIAL EVALUATION PROCESS**

12 The Social Security Act (the Act) defines disability as the “inability to engage  
13 in any substantial gainful activity by reason of any medically determinable physical  
14 or mental impairment which can be expected to result in death or which has lasted or  
15 can be expected to last for a continuous period of not less than twelve months.” 42  
16 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a plaintiff shall  
17 be determined to be under a disability only if any impairments are of such severity  
18 that a plaintiff is not only unable to do previous work but cannot, considering  
19 plaintiff’s age, education and work experiences, engage in any other substantial  
20 work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A),

1 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and  
2 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001).

3 The Commissioner has established a five-step sequential evaluation process  
4 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step  
5 one determines if the person is engaged in substantial gainful activities. If so,  
6 benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the  
7 decision maker proceeds to step two, which determines whether plaintiff has a  
8 medically severe impairment or combination of impairments. 20 C.F.R. §§  
9 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

10 If plaintiff does not have a severe impairment or combination of impairments,  
11 the disability claim is denied. If the impairment is severe, the evaluation proceeds to  
12 the third step, which compares plaintiff's impairment with a number of listed  
13 impairments acknowledged by the Commissioner to be so severe as to preclude  
14 substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20  
15 C.F.R. § 404 Subpt. P App. 1. If the impairment meets or equals one of the listed  
16 impairments, plaintiff is conclusively presumed to be disabled. If the impairment is  
17 not one conclusively presumed to be disabling, the evaluation proceeds to the fourth  
18 step, which determines whether the impairment prevents plaintiff from performing  
19 work which was performed in the past. If a plaintiff is able to perform previous work  
20 that plaintiff is deemed not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv),

1 416.920(a)(4)(iv). At this step, plaintiff's residual functional capacity (RFC) is  
2 considered. If plaintiff cannot perform past relevant work, the fifth and final step in  
3 the process determines whether plaintiff is able to perform other work in the national  
4 economy in view of plaintiff's residual functional capacity, age, education and past  
5 work experience. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v.*  
6 *Yuckert*, 482 U.S. 137 (1987).

7 The initial burden of proof rests upon plaintiff to establish a *prima facie* case  
8 of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir.  
9 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
10 met once plaintiff establishes that a mental or physical impairment prevents the  
11 performance of previous work. The burden then shifts, at step five, to the  
12 Commissioner to show that (1) plaintiff can perform other substantial gainful  
13 activity and (2) a "significant number of jobs exist in the national economy" which  
14 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup> Cir. 1984).

#### 15 STANDARD OF REVIEW

16 Congress has provided a limited scope of judicial review of a Commissioner's  
17 decision. 42 U.S.C. § 405(g). A Court must uphold a Commissioner's decision,  
18 made through an ALJ, when the determination is not based on legal error and is  
19 supported by substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup> Cir.  
20 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999). "The [Commissioner's]

determination that a plaintiff is not disabled will be upheld if the findings of fact are supported by substantial evidence.” *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup> Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-02 (9<sup>th</sup> Cir. 1989). Substantial evidence “means such evidence as a reasonable mind might accept as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971)(citations omitted). “[S]uch inferences and conclusions as the [Commissioner] may reasonably draw from the evidence” will also be upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On review, the Court considers the record as a whole, not just the evidence supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989)(quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

It is the role of the trier of fact, not this Court, to resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational interpretation, the Court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d

1 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial evidence to support the  
2 administrative findings, or if there is conflicting evidence that will support a finding  
3 of either disability or nondisability, the finding of the Commissioner is conclusive.  
4 *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9<sup>th</sup> Cir. 1987).

### 5 **ALJ'S FINDINGS**

6 ALJ Sherry found Phillips was insured through March 31, 2010 (Tr. 21, 23).  
7 At step one, he found Phillips did not work at substantial gainful activity levels after  
8 onset (Tr. 23). At steps two and three, he found Phillips suffers from advanced  
9 glaucoma, status post surgical repair; chronic right shoulder subluxation/dislocation;  
10 advanced degenerative joint disease (DJD) of the right shoulder, status post two  
11 surgical repairs; left knee degeneration; lower left extremity deep venous  
12 thrombosis; recurrent seizure disorder/epilepsy, unspecified; migraines headaches;  
13 L1, L2 compression fracture; anxiety disorder; dysthymia; adjustment disorder with  
14 depressed mood; alcohol dependence and personality disorder, impairments that are  
15 severe but do not meet or medically equal a Listed impairment (Tr. 23-24). The ALJ  
16 found Phillips less than fully credible, a finding challenged on appeal. The ALJ  
17 assessed an RFC for a range of sedentary work (Tr. 26). At step four, he relied on  
18 the vocational expert and found Phillips is unable to do any past relevant work (Tr.  
19 31, 115-17). At step five, again relying on the VE, the ALJ found Phillips can do  
20 other work such as charge account clerk, surveillance system monitor and final

1 assembler. Accordingly, the ALJ found Phillips is not disabled as defined by the Act  
2 (Tr. 31-32, 117).

### 3 ISSUES

4 Phillips alleges the ALJ erred when he assessed credibility and weighed the  
5 medical opinion evidence. ECF No. 16 at 10-21. Specifically, he alleges the ALJ  
6 should have given more credit to the opinions of examining professionals Drs.  
7 Dalley and Rosenkrans, and less to reviewing advisor Dr. Brown. ECF No. 16 at 17-  
8 22. Phillips alleges his seizure disorder meets the Listing, the ALJ erred when he  
9 assessed evidence of visual limitations and misconstrued plaintiff's testimony with  
10 respect to overhead reaching. The Commissioner responds that the ALJ's findings  
11 are factually supported and free of harmful legal error. She asks the court to affirm.  
12 ECF No. 18 at 2.

### 13 DISCUSSION

#### 14 A. Credibility

15 Phillips alleges the ALJ's credibility assessment is based on factual and legal  
16 error. ECF No. 16 at 10-15.

17 When presented with conflicting medical opinions, the ALJ must determine  
18 credibility and resolve the conflict. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d  
19 1190, 1195 (9<sup>th</sup> Cir. 2004)(citation omitted). The ALJ's credibility findings must be  
20 supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9<sup>th</sup>



1 Cir. 1990). Absent affirmative evidence of malingering, the ALJ's reasons for  
2 rejecting the claimant's testimony must be "clear and convincing." *Lester v. Chater*,  
3 81 F.3d 821, 834 (9<sup>th</sup> Cir. 1995).

4 The ALJ's reasons are clear and convincing.

5 ALJ Sherry relied, in part, on unexplained or inadequately explained failure to  
6 take medication as prescribed and to follow medical treatment recommendations.

7 The record supports the ALJ's findings. Phillips refused to take medication  
8 prescribed for glaucoma and depression. He did not follow up with testing as  
9 directed to determine if medication prescribed to control seizures was at therapeutic  
10 levels. He did not take anti-seizure medication as prescribed. He failed to return to  
11 have glaucoma pressures checked as directed. Mental health treatment has been  
12 infrequent. Prescribed psychotropic and anti-seizure medication have been effective  
13 when taken as directed. A treating doctor notes Phillips very inconsistently complied  
14 with follow up after glaucoma surgery. Following a back injury Phillips refused to  
15 wear a prescribed back brace, claiming it was "flimsy" (Tr. 27, 267, 289, 296, 375,  
16 379, 402, 417, 427, 438, 442, 456, 465, 489, 504-05, 510, 526-28, 531, 533, 538,  
17 547, 691, 696).

18 The ALJ relied on Phillips' inconsistent statements. The ALJ noted plaintiff  
19 testified he had migraines 2-3 times daily lasting last six hours, but he told a medical  
20 provider in May 2009 he had severe migraines every two weeks typically lasting

1 four hours. Phillips alleges the condition has been ongoing with varying rates of  
2 frequency, therefore the statements are not inconsistent. ECF No. 16 at 11-12,  
3 referring to Tr. 29, 107, 463, 465, 530, 540 (January-February 2009 and August  
4 2009).

5 Even if the Court accepts that the ALJ misconstrued this evidence, error if any  
6 is harmless because there are many more inconsistencies between plaintiff's  
7 testimony and the medical record. As the Commissioner accurately points out,  
8 Phillips testified he was compliant with taking prescribed medication since June  
9 2007, but medical records from providers contradict his statement. ECF No. 18 at 7,  
10 citing Tr. 29, 109, *see, e.g.*, Tr. 427-28 (missed doses of anti-seizure medication,  
11 2009); Tr. 481, 488 (needs to get back on glaucoma medications, 2010) and Tr. 596  
12 (provider notes has not yet started on prescribed anti-seizure medication, September  
13 2008). Phillips reported he was discharged from the military after his first seizure  
14 "and due to bone fragments in spine" (Tr. 289). He testified he was discharged  
15 because "I had problems with my left knee at the time" (Tr. 94). And the ALJ  
16 correctly relied on test results "potentially involving considerable distortion" (Tr. 30,  
17 632 (results of Personality Assessment Inventory), 643 (rule out malingering)).

18 The ALJ's reasons are clear, convincing and supported by substantial  
19 evidence. *See Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9<sup>th</sup> Cir.  
20 2002)(inconsistencies in plaintiff's statements are properly considered); *Burch v.*

1 *Barnhart*, 400 F.3d 676, 680 (9<sup>th</sup> Cir. 2005)(inadequately explained lack of  
2 consistent treatment and noncompliance with treatment are properly considered)  
3 and *Warre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9<sup>th</sup> Cir.  
4 2006)(impairments controlled effectively with medications are not disabling for the  
5 purpose of determining SSI benefit eligibility). *Edlund v. Massanari*, 253 F.3d 1152,  
6 1157 (9<sup>th</sup> Cir. 2001)(a tendency to exaggerate is properly considered when assessing  
7 credibility).

8 *B. Psychological limitations*

9 Phillips alleges the ALJ failed to properly credit the contradicted opinions of  
10 examining psychologists Mahlon Dalley, Ph.D. (Tr. 469-79) and Frank Rosenkrans,  
11 Ph.D. (Tr. 625-34). He alleges the ALJ erred by crediting instead the opinion of  
12 Michael Brown, Ph.D., who reviewed the records. ECF No. 16 at 16-17. The  
13 Commissioner responds that the ALJ's reasons are specific, legitimate and supported  
14 by the record.

15 The ALJ properly considered the opinion of another examining psychologist,  
16 John McRae, Ph.D., in addition to the opinions of the Dr. Brown and other  
17 reviewing psychologists.

18 Dr. McRae. On April 11, 2008, about ten months after onset, Dr. McRae  
19 performed a GAU evaluation (Tr. 422-24). The ALJ largely credited this opinion.  
20 Phillips told McRae he went to two counseling sessions and was prescribed

1 medication for depression last year; he felt both were helpful. He was in the Army  
2 for about six months but had problems with his knees. He last worked fifteen years  
3 ago. He is unable to afford medications for high cholesterol and depression and  
4 anxiety (Tr. 423). He last drank six weeks ago (Tr. 422)[He has also smoked for  
5 more than thirty years (Tr. 757).] Dr. McRae opined Phillips' description of seeing  
6 ghosts and hearing voices "seems like an exaggeration of symptoms" (Tr. 423). He  
7 expected Phillips to improve with antidepressant medication because he indicated it  
8 helped in the past (Tr. 424, 801).

9 Dr. Dalley. Phillips alleges the ALJ should have credited Dr. Dalley's  
10 December 2009 opinion (Tr. 469-79). Dalley opined it is likely that Phillips suffers  
11 marked interference in functioning due to health concerns and depression (Tr. 470).  
12 He notes the MMPI-2 was invalid due to over-reporting, but suspected this was a  
13 "cry for help." Dalley notes Phillips continues drinking despite his doctor's  
14 recommendation he abstain because of the medications he is prescribed (Tr. 471).  
15 Phillips' allegation to the contrary is simply unsupported by the record.

16 Dalley notes Phillips was not currently receiving mental health treatment. He  
17 assessed three marked limitations (Tr. 471-73). Phillips reported audio and visual  
18 hallucinations. Dalley observes a side effect of depakote, which Phillips takes to  
19 control seizures, causes hallucinations in some individuals (Tr. 475). Phillips  
20 reported he does laundry, cooks, and has no difficulty doing daily household chores.

1 Results on the MMPI-2 are invalid and indicate “he was over-reporting  
2 psychopathology on the test” (Tr. 476).

3 The ALJ properly discounted Dalley’s contradicted opinion that Phillips  
4 suffers marked limitations because Phillips exaggerated his limitations to the point  
5 of invalid test results, and because examining psychologist Dr. McRae opined  
6 mental health limitations are likely to improve with antidepressant medication, as  
7 Phillips said it had helped in the past (Tr. 29, 424, 476). The ALJ notes in April  
8 2010 Phillips told his treatment provider he “is not interested in starting on an  
9 antidepressant at this time.” At the same appointment he admitted drinking alcohol  
10 by himself at times, which he also admitted makes him more depressed (Tr. 29, 526,  
11 528).

12 The ALJ’s reasons are specific, legitimate and supported by substantial  
13 evidence, as required. *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9<sup>th</sup> Cir. 2008).  
14 Evidence of exaggeration is a convincing reason to discount a claimant’s allegations  
15 or a doctor’s opinion predicated on them, as the Commissioner correctly observes.  
16 ECF No. 18 at 13, citing *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190,  
17 1196 (9<sup>th</sup> Cir. 2004); *see also Edlund v. Massanari*, 253 F.3d at 1157. Inconsistency  
18 between a doctor’s opinion and the rest of the record is also a legitimate reason to  
19 discount the opinion. *Bayliss v. Barnhart*, 427 F.3d 1211, 1216-17 (9<sup>th</sup> Cir. 2005)

20 Dr. Rosekrans. Dr. Rosekrans evaluated Phillips in October 2011. The ALJ’s

1 reasons for rejecting Dr. Rosekrans' assessed marked limitations are similarly  
2 legitimate and supported by the evidence. Again testing shows exaggeration. Dr.  
3 Rosekrans made a rule out diagnosis of malingering (Tr. 629, 632, 634). The opinion  
4 of examining psychologist Dr. McRae (as well as those of agency reviewing  
5 psychologists) contradict Dr. Rosekrans' assessed marked limitations. As noted, in  
6 2010 Phillips was not interested in taking antidepressants (Tr. 29, 528). He reported  
7 drug use may be the source of some his problems (Tr. 423, 644). Phillips describes  
8 himself as getting along "very, very well" with authority figures. Activities such as  
9 socializing with friends and singing karaoke contradict Rosekrans' assessed marked  
10 limitation in the ability to perform effectively in a work setting with even *limited*  
11 public contact. (Tr. 265, 267, 290, 294-95, 626-27, 638)(emphasis added).

12 Phillips alleges the ALJ failed to take into account five moderate limitations  
13 assessed by Dr. Brown. ECF No. 16 at 22, citing Tr. 585-86. This is incorrect. The  
14 ALJ incorporated the assessed limitations in the RFC. Simple, routine repetitive  
15 tasks accommodate moderate limitations in the ability to understand, remember and  
16 carry out detailed instructions, and maintain concentration for extended periods.  
17 Superficial interaction with the public, co-workers and supervisors accommodates  
18 moderate limitations in the ability to interact appropriately with the public and get  
19 along with coworkers without distracting them or showing behavioral extremes (Tr.  
20 26, 587). The ALJ did not err. *See Stubbs v. Danielson*, 539 F.3d 1169, 1173-74 (9<sup>th</sup>

1 Cir. 2008)(an ALJ's assessment of a claimant adequately captures restrictions  
2 related to concentration, persistence or pace where the assessment is consistent with  
3 restrictions identified in the medical testimony)(internal citations omitted).

4 The ALJ properly relied on the medical opinions supported by other evidence  
5 in the record, including Phillips' functioning and activities. To the extent that other  
6 physicians' conflicting opinions rested on independent, objective findings, those  
7 opinions could constitute substantial evidence. *Magallanes v. Bowen*, 881 F.2d 747,  
8 753 (9<sup>th</sup> Cir 1989); *Miller v. Heckler*, 770 F.2d 845, 849 (9<sup>th</sup> Cir. 1985). An opinion  
9 may properly be rejected if it is not based on objective medical evidence. *See*  
10 *Nguyen v. Chater*, 100 F.3d 1462, 1464 (9<sup>th</sup> Cir. 1996).

11 *C. Physical limitations*

12 Phillips alleges the ALJ erred when he misread a January 26, 2010 treating  
13 doctor's notes. ECF No. 16 at 15-16, citing Tr. 28, 481.

14 These notes from the Davenport Vision Clinic show Phillips' corrected vision  
15 was 20/20 (OD) and 20/-1 (OS) on January 26, 2010 (Tr. 481, 596; *see also* Tr. 609:  
16 after left eye surgery on December 29, 2010, claimant's vision is 20/30). Treating  
17 sources note very inconsistent compliance with medical treatment for three months  
18 following this surgery (Tr. 623). Phillips argues the notes are not entirely legible.  
19 The pertinent results, however, are clear. His allegation that the ALJ misread or  
20 misinterpreted the record is unsupported.

1 Phillips alleges the ALJ erred when he found at step three that no listing was  
2 met or equaled. He alleges his seizure disorder meets Listing 11.02 or 11.03. ECF  
3 No. 16 at 14, but he bases the allegation on his own unreliable testimony and reports  
4 to providers. While it is clear he has been diagnosed with epilepsy, it is the  
5 claimant's burden to establish an impairment meets or equals a listing. *Tacket v.*  
6 *Apfel*, 180 F.3d 1094, 1098-99 (9<sup>th</sup> Cir. 1999). Phillips falls far short of meeting his  
7 burden. In particular, the failure to take anti-seizure medication as prescribed and  
8 obtain lab work as directed to determine the medication's therapeutic levels indicate  
9 Phillips does not appear to think his impairment is severe. Treating sources note  
10 Phillips has had a good response to depakote for seizure disorder: "Continue on  
11 depakote regimen with good response appreciated. Although, states that stress will  
12 exacerbate symptoms with last seizure approximately six weeks ago." (Tr. 564);  
13 "Good response and well tolerated" (Tr. 567); "States that current dose of meds has  
14 been satisfactory at keeping seizures under control." (Tr. 569)(Seizure control is  
15 fairly good as long as he is compliant with his medications)(Tr. 807). A treating  
16 source in October 2010 notes Phillips still has not had depakote levels checked and  
17 he misses approximately two doses per week (Tr. 614; *see also* Tr. 655: in 2002,  
18 notes indicate he "is not taking his depakote now")(October 17, 2007, Tr.  
19 830)(same).

20 Phillips alleges the ALJ erred by finding he is capable of frequent overhead



1 reaching with his right arm. ECF No. 16 at 16. The Commissioner responds that  
2 although Phillips testified he experienced a “problem” reaching overhead with his  
3 right arm and that it made a noise when he did so, he also testified he was able to  
4 reach overhead with his left arm if he needed to reach high. ECF No. 18 at 10-11,  
5 Tr. 104-05.

6 The ALJ properly rejected a more severe limitation as unsupported by  
7 objective evidence, including medical records indicating Phillips has normal range  
8 of motion in his right shoulder (Tr. 28, 507; 739, 742, 850). In “hypotheticals posed  
9 to a vocational expert, the ALJ must only include those limitations supported by  
10 substantial evidence.” *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 886 (9<sup>th</sup> Cir.  
11 2006).

12 Where the evidence is susceptible to more than one rational interpretation, it is  
13 the conclusion of the ALJ that must be upheld. *Morgan v. Comm’r of Soc. Sec.*  
14 *Admin.*, 169 F.3d 595, 599 (9<sup>th</sup> Cir. 1999)(citation omitted).

15 The ALJ properly weighed the contradictory evidence. The record fully  
16 supports the assessed RFC. Although Phillips alleges the ALJ should have weighed  
17 the evidence differently, the ALJ is responsible for determining credibility, resolving  
18 conflicts in medical testimony and resolving ambiguities. *Tommasetti v. Astrue*, 533  
19 F.3d 1035, 1041-42 (9<sup>th</sup> Cir. 2008)(internal citations omitted). It is the role of the  
20 trier of fact, not this court, to resolve conflicts in evidence. *Richardson v. Perales*,

1 402 U.S. 389, 400 (1971). If evidence supports more than one rational interpretation,  
2 the Court may not substitute its judgment for that of the Commissioner. *Tackett*, 180  
3 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999); *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> 1984). If  
4 there is substantial evidence to support the administrative findings, or if there is  
5 conflicting evidence that will support a finding of either disability or nondisability,  
6 the finding of the Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226,  
7 1229-30 (9<sup>th</sup> Cir. 1987).

### 8 **CONCLUSION**

9 After review the Court finds the ALJ's decision is supported by substantial  
10 evidence and free of harmful legal error.

### 11 **IT IS ORDERED:**

12 Defendant's motion for summary judgment, **ECF No. 19**, is **granted**.

13 Plaintiff's motion for summary judgment, ECF No. 16, is denied.

14 The District Court Executive is directed to file this Order, provide copies to  
15 counsel, enter judgment in favor of defendant and **CLOSE** the file.

16 DATED this 10<sup>th</sup> day of June, 2014.

17  
18 S/ James P. Hutton

19 JAMES P. HUTTON  
20 UNITED STATES MAGISTRATE JUDGE